United States Court of Appeals

FOR THE NINTH CIRCUIT

No. 13611

MELVIN GRIFFETH and LOIS D. GRIFFETH, *Appellants,*

vs.

UTAH POWER & LIGHT COMPANY, a Corporation, *Appellee.*

BRIEF OF APPELLANTS

APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF IDAHO

HONORABLE CHASE CLARK, *Judge*

WALTER H. ANDERSON and GUS CARR ANDERSON,
Residence: Pocatello, Idaho

NEWEL G. DAINES, Residence: Logan, Utah

L. DELOS DAINES, Residence: Salt Lake City, Utah

Attorneys for Appellants

INDEX

CASES AND AUTHORITIES CITED

STATUTES AND RULES

United States Court of Appeals

FOR THE NINTH CIRCUIT

No. 13611

MELVIN GRIFFETH and LOIS D. GRIFFETH, *Appellants,*

vs.

UTAH POWER & LIGHT COMPANY, a Corporation, *Appellee.*

BRIEF OF APPELLANTS

This action was filed originally in the District Court of the Fifth Judicial District of the State of Idaho, in and for the County of Bannock, by the appellants against appellee, and was thereafter removed to the United States District Court of Idaho, Eastern Division.

COMPLAINT

The complaint alleges that the appellee was a corporation of the State of Maine, that the appellants were owners of lands and lessees of other lands located in Franklin County, Idaho. The lands were described by meets and bounds; that the lands were farm lands at the date of the injuries complained of, said lands were planted in crops and located upon the lands were livestock, poles, wheat, barley and fences.

That Bear River is a stream of water which has its source in the State of Utah, flows in a general northerly direction into the State of Wyoming and thence in the State of Idaho and thence in a general direction of south into the State of Utah; that it runs in a general southerly direction through the lands owned and leased by the appellants.

That appellee is engaged in the sale of electricity and prior to the date of the injuries alleged were controlling the flow of Bear River by diverting the waters into Bear Lake and into a reservoir known as Oneida Station, and also at a point near Soda Springs for the storage of water for the generation and manufacture of electricity, and in so doing, constructed dams in the channel of Bear River, particularly at Oneida Station and Soda Point and near Bear Lake, and by the use of the dams appellee did, and at the time of the injuries complained of, control and regulate the flow of Bear River.

That on January 7, 1949, and for approximately five days prior thereto appellee carelessly and negligently discharged into the river, water in such quantity and volume that the banks of the river, at a point about 40 rods from property line of appellants, could not contain said water, and that the water at said point did overflow the banks and flooded appellants property, and the reason the water overflowed the banks at said point was because the appellee discharged water into said river and the same froze over, whereupon the appellee then discharged additional quantities of water that flowed over the frozen water and overflowed the banks at the point above mentioned, and that appellee discharged said water into the said river after quantities had frozen in the bed thereof and had caused it to overflow at the point above mentioned; that the appellee had notice and had been warned that appellants' lands would be flooded by the manner of discharging water into said stream, and that the appellee at said time and place discharged into said stream a great quantity of water far in excess of the normal flow thereof.

That the appellee knew or should have known at the time it discharged water into said river that the banks of said river could not contain said volume and quantity

of water and that as a result of said carelessness, appellants' lands were flooded, and damaged, their cattle drowned and the other personal property thereon destroyed; that the damages sustained were proximately caused by the appellee's negligence and misconduct as it was warned in advance of the flooding of said appellants' lands that the same would occur unless measures were taken to prevent it, and that appellee neglected, declined, failed and refused to take any measures to prevent flooding of appellants' lands.

That the appellants did not anticipate and did not expect and could not foresee that the water would flow to the extent it did and would reach and drown said cattle.

Appellants asked for judgment against appellee for their actual damages in the sum of $6,577.00, and for the sum of $10,000.00 punitive damages, costs of suit and general relief. (R. 7-15)

ANSWER

First Defense

Appellee alleged that appellants failed to state facts upon which relief could be granted.

Second Defense

Appellee admitted it was a Maine corporation; that appellants were the owners of the lands set forth in their complaint; that Bear River flowed in the directions alleged.

Appellee alleged it was a public utility corporation engaged in the generation of electricity by both hydroelectric and steam generators, and the sale thereof to the public, that its business in all respects was lawful and that its business at all times referred to in appellants' complaint was operated and maintained in a careful and lawful manner.

Appellee denied all other allegations of appellants' complaint except those admitted.

THIRD DEFENSE

That the property owned and leased by the appelles was subject to a release and easement in the words and figures as follows:

RELEASE AND EASEMENT

This agreement made and entered into this 22 day of December, 1926, by and between Utah Power & Light Company, hereinafter referred to as "Grantee," and George Thomas and Anna S. Thomas, his wife, hereinafter called "Grantors", witnesseth:

That for a valuable consideration the receipt of which is hereby acknowledged, the Grantors above named hereby release and discharge the Utah Power & Light Company, its successors and assigns, from any and all claims heretofore caused to the lands by flooding or by the impounding or storage of the waters of Bear Lake, or by the fluctuation of the flow of said river, or by depositing of ice thereon, or otherwise, and/or due to the maintenance or operation of Grantee's Oneida Power Plant or other plants operated by said Grantee on said Bear River;

And for said consideration, above named, Grantors, their successors and assigns, hereby grant unto said Utah Power & Light Company, its successors and assigns, an easement for and the right to continue as aforesaid the manipulation and fluctuation of the flow of said river as it passes in its natural channel through or along the lands owned, claimed or possessed by the Grantors, located in Section 17, Township 15 South, Range 39 East, B.B. & M., particularly including, but not limited to, the following land, to-wit:

> The Southwest Quarter of the Northwest Quarter, the East half of the Southwest Quarter and the Southwest Quarter of the Southwest Quarter of Section 17, Township 15 South, Range 39 East, B.B. & M., excepting approximately 10 acres heretofore transferred to the Riverview Sanitarium Company, containing 150 acres, more or less.
>
> And for said consideration any damages that may result from future flooding or depositing of ice on said land caused by the fluctuation of the flow of said river in the normal operation of Grantee's plant or plants, up stream from Grantor's land, are hereby waived and released, provided future fluctuations shall not exceed those heretofore occurring in the operation of said Oneida Plant.
>
> In witness whereof, the parties have hereunto set their hands this 22 day of December, 1926.

That appellants acquired the property subject to the release and easement, and that they were barred from maintaining cause of action set forth in their complaint.

Fourth Defense

Appellee alleged appellants' cause of action was barred by the statute of limitation, by provisions of Sec. 5-218 of Idaho Code, for the reason that the complaint was not filed nor the action commenced within three years from and after the date said cause of action arose.

It alleged that if appellants' property was damaged as alleged, that said damage was caused by appellants' negligence in failing to exercise ordinary care for the removal of livestock and other personal property from the premises in time to avoid damage thereto. (R. 19-23).

JURISDICTION

This is a civil action between citizens of different states where the amount in controversy exceeds the sum

of $3,000 exclusive of interest and costs, and the United States District Court of Idaho has jurisdiction thereof, under Title 28, Sec. 1332, U.S.C.A. (R. 3-5, 8).

This action was transferred by the District Court of the Fifth Judicial District of the State of Idaho in and for the County of Bannock upon motion of the appellee. (R. 3-7).

This appeal is from a final judgment of the United States District Court for the State of Idaho. The United States Court of Appeal for the Ninth District has appellant jurisdiction of this action under Title 28 U.S.C.A. 41. (R. 52).

APPELLEE'S MOTION FOR SUMMARY JUDGMENT

The appellee moved the court for summary judgment in its favor pursuant to Rule 56 of Federal Rules of Civil Procedure upon the grounds that the lands referred to and described in appellants' complaint were formerly owned by George Thomas and Anna E. Thomas, and the lands were acquired by appellants subsequent to December 22, 1926, and subsequent to January 11, 1927, and the lands owned and leased by appellants as set forth in their complaint were subject to an easement granted on the 22nd day of December, 1926, by George and Anna E. Thomas to the appellee.

In its motion, the appellee set forth the release and easement hereinbefore set forth. Supra.

It set forth that the operation of its Oneida Dam referred to in appellants' complaint was carried on during the months of December 1948, and January 1949, in a normal manner that the fluctuation of the waters of Bear River by reason of the operation of said dam was no greater than the fluctuation which occurred prior to December 22, 1926, that by reason of said easement the

lands of appellants, both owned and leased, were subject to the terms of the easement, and that the appellee was not liable to the appellants for the damage referred to in appellants' complaint.

Appellee based its motion upon the pleadings in the cause and upon the affidavits of J. A. Hale and C. L. Swenson. (R. 23-27).

Affidavit of J. A. Hale

The affidavit of J. A. Hale set forth that he was a graduate civil engineer and had pursued his profession as an engineer since 1911; that in 1913 he was employed by the appellee as civil engineer; that he continued in such employment until 1923 when he became assistant chief engineer of appellee company, which position he occupied until 1926 when he became its chief engineer, which position he occupied until 1937 when he was made vice president of appellee company in charge of engineering, which position he has held and now holds; that he was familiar with the construction of appellee's Oneida dam and power plant which was built in the years 1913 to 1920, and that at all times since the construction of the said dam he has "been personally familiar with said dam and personally familiar with the operation thereof".

That said dam and power plant was built for the purpose of impounding the waters of Bear River and employing its waters for the generation of hydro-electric power.

Affiant stated prior to December 22, 1926, "the land referred to and described in appellants' complaint was the property of George Thomas and Anna E. Thomas, his wife; that prior to December 22, 1926, George Thomas and Anna E. Thomas asserted a claim against appellee and demanded damages for the alleged flooding of lands referred to and described in appellants' complaint, that the said claim was compromised and settled on December

22, 1926, that George Thomas and Anna E. Thomas signed, executed and delivered to appellee a release and easement. Said release and easement was set forth in the affidavit verbatim, he stated that the lands referred to and described in said release and easement included the lands referred to and described in appellants' complaint, that in the month of December, 1948, and in the month of January, 1949, "he was familiar with the operation of the Oneida power plant of appellee and that the same was operated normally and in the same manner in which it was operated prior to December, 1926".

Affiant further stated, "that fluctuation of the Bear River by reason of the use and operation of the Oneida dam was no greater in the months of December, 1948, and January, 1949, than were fluctuations which occurred prior to December 22, 1926".

Affidavit of C. L. Swenson

The affidavit of C. L. Swenson was to the effect that he was the County Recorder of Franklin County, Idaho; that he had in his possession and under his control, files and records of Franklin County, Idaho, and that on January 12, 1927 at 12:25 P.M. on said day the easement in question was recorded in Book 5 of Miscellaneous Records, Page 4 of the records of Franklin County, Idaho. A certified copy of the easement was marked, "Exhibit "A", and made a part of the affidavit.

That on March 15, 1941, at 11:00 o'clock A.M. there was filed for record with the Recorder of Franklin County, Idaho, a certain deed executed by George Thomas and Anna E. Thomas to Edward T. Griffeth, which deed was dated August 10, 1935, and acknowledged November 6, 1935, and recorded in Book 33 of Deeds at Page 589 of the records of Franklin County, Idaho. A certified copy

of the deed was attached to affidavit and marked "Exhibit "B".

That on September 27, 1946, a deed from Edward T. Griffeth and Lillian B. Griffeth, his wife, to Melvin P. Griffeth and Lois D. Griffeth, dated September 19, 1946, was recorded in Book 39 of Deeds at Page 342 of the records of Franklin County, Idaho, a certified copy of the deed being attached to said affidavit, and marked Exhibit "C" and made a part thereof. (R. 33-42). (End of affidavit.

The lands described in the easement, Exhibits "A", and in the warranty deed, Exhibits "B", and "C" is the same land as described in appellants' complaint. (R. 8, 34-42).

In resistance to appellee's motion for summary judgment the appellants filed the affidavit of Edward Griffeth.

Affidavit of Edward Griffeth

It was set forth in the affidavit of Edward Griffeth that he was 75 years old, that he was familiar with the lands described in the affidavit of J. A. Hale that two or three years before December 22, 1926, he entered into a contract with George E. Thomas and his wife to purchase the land; he did not have the original contract nor a copy thereof, did not know where such contract is or if it is in existence; that upon entering into the contract he held possession of the land and remained in possession until he sold to Melvin Griffeth that he was in actual possession of the land and occupancy thereof on December 22, 1926, when said purported easement set out in the affidavit of J. A. Hale was executed; that at the time he had paid considerable portion of the purchase price of said lands to George Thomas and that he

did not know of the execution of the easement, did not consent thereto, was not consulted with regard to the same by either George E. Thomas or any other person, that he conveyed the lands to Melvin Griffeth on September 19, 1946, that from the time he purchased the lands from George E. Thomas up until he sold the lands to Melvin Griffeth the river never at any time overflowed its channel, nor was he disturbed or annoyed by excess water on said lands, and that the river remained in its channel all during the time of his possession and occupancy. (R. 43).

Affidavit of Evelyn Griffeth

In the affidavit of Evelyn Griffeth she stated she was 70 years old, that she lived upon the lands adjoining the lands involved in this lawsuit and "that this affiant knows of her own personal knowledge that for 45 years with the exception hereinafter noted, she had lived upon same and that the said river never was out of its channel."

Affiant further states, "that in January 1949, the said river overflowed its channel on said land and deep enough on said lands of Melvin Griffeth at said time to reach the armpits of her son Von Griffeth when he went out on the said lands of Melvin Griffeth to try to save cattle while the river had risen; that all of these things are of the personal knowledge of this affiant and are not based on anything someone might have told her." (R. 45).

The appellee, in rebuttal, filed the affidavit of S. J. Quinney.

Affidavit of S. J. Quinney

Mr. Quinney set forth in his affidavit that he had read the affidavits of Edward Griffeth, J. A. Hale and C. L. Swenson, and that the person referred to in the affidavit of Edward Griffeth as "George E. Thomas" and

referred to in the affidavits of J. A. Hale and C. L. Swenson as "George Thomas" were one and the same man; that he knew George Thomas in his lifetime and that said George Thomas died in the city and county of Salt Lake, State of Utah, on April 11, 1951. (R. 46).

STIPULATION AND ORDER

At the time the court granted appellants' motion to amend their complaint it was agreed by the parties and the court so ordered that the land which appellants had under lease and described in their amendment to complaint, (R. 13-15), was subject to a similar easement as that described in appellee's Answer and Motion for Summary Judgment and that appellee's motion for summary judgment and affidavits in support of motion and answer would cover the land not only owned by the appellants but leased by them as well. (R. 59-63).

HEARING ON THE MOTION FOR SUMMARY JUDGMENT

At the hearing on motion for summary judgment the appellants moved to strike J. A. Hale's affidavit beginning with paragraph 3 to the end thereof. (R. 47).

ORDER

The motion to strike certain portions of the affidavit of J. A. Hale was denied, and the court ruled on the motion for summary judgment as follows:

> "NOW, THEREFORE, the Court is of the opinion that the Summary Judgment should be granted in part as suggested at oral argument in that plaintiffs are bound by the release and easement agreement. This can be taken care of at the time of trial.

The Summary Judgment will be denied subject to the above reservation." (R. 47-48).

STATEMENT OF FACTS

The case was tried before a jury, and at the conclusion of appellants' case, upon appellee's motion, the court directed a verdict in favor of appellee and against appellants. (R. 151, 143). Judgment was entered accordingly. (R. 52).

At the beginning of the trial the district court ruled that the only evidence to be offered by appellants was whether there had been an abuse of the easement set forth in appellee's answer and any damages by reason thereof. (R. 61-63)

The purported release and easement was never offered nor received in evidence. It was pleaded as an affirmative defense. (R. 20, 140-142.)

At the conclusion of appellants' case, the court ruled that the appellants had failed to show that the appellee had been negligent in the handling of the easement. (R. 140-142).

This case arose out of the flooding of appellants' lands on or about the 7th day of January, 1949, by the waters of Bear River. (R. 73, 94, 95).

Bear River is a stream of water having its source in Utah, from which it flows in a general northerly direction into the State of Wyoming, thence into the State of Idaho, thence in a general direction of south into the State of Utah. As it passes on its way into Utah it runs through appellants' lands. (R. 8, 9, 19).

About 1912 to 1914 the appellee built a dam across Bear River at Oneida, Idaho. (R. 73, 78). This dam, together with other water storage facilities were used by appellee for storage of water from the watershead of Bear River. The dam was also used in the regulation and manipulation of the flow of the river. (R. 131, 133, 134, 136, 138).

The Oneida Dam is situated about 14 miles north of appellants' property. (R. 81). All of the water flowing down Bear River above the dam must come over or under it. (R. 129).

Between Oneida and appellants' property the stream is augmented by four small creeks. (R. 111).

Since the erection of the dam at Oneida the appellee has regulated the flow of the water passing down Bear River and as it passes north of and through appellants' lands and to the south thereof. (R. 79, 80, 87, 138).

Prior to the appellee building its dam at Oneida, the waters of Bear River flowed uncontrolled in its natural channel (R. 79) and during the winter months the river would freeze over and the water would flow under the ice, never overflowing its banks. (R. 79).

After the appellee built its dam at Oneida it commenced to regulate the flow of the river. In the morning it would send limited or small amounts of water from its dam at Oneida, and in the afternoons it would send forth large quantities of water, (R. 80, 87) and in the winter months when small amounts of water were sent down the river it would freeze over and then in the evening when larger amounts of water were sent down the river, it would cause the ice already formed to break up. This ice would settle to the bottom of the channel, other ice would be deposited on it by the same process, then such would be broken loose, causing ice jams to form in the river channel. (R. 79, 80).

Prior to the building of the dam at Oneida and after the building of the dam, appellants' lands had never been flooded until they were flooded in January, 1949. (R. 79, 80, 98, 103, 104, 106, 113, 116, 118, 123).

However, after construction of the dam and before 1949 the river had in some instances, north of appellants'

property, flooded some low lands and sloughs. (R. 106, 118).

Ice jams occurred near appellants' property during the years, 1947, 1948, 1949, and several years prior thereto. (R. 81).

In the months of December, 1948 and up to and including the 7th day of January, 1949, the appellee manipulated and regulated the volume of water flowing down Bear River between the Oneida Dam and the lands of the appellants. (R. 138)

On January 2, 3, 4, 5, 6 and 7, 1949, it discharged down Bear River from its dam at Oneida more water than flowed into its natural facilities from the river's watershed. (R. 146).

The months of December, 1948, and January, 1949, were cold months and appellee knew of such as it kept daily temperature records. (R. 84, 86, 107, 123, 125).

A few days prior to January 7, 1949, Melvin Griffeth, one of the appellants, noticed that the water from Bear River, because of ice jams to the south of his property, had started to flood the south portion of his lands, (R. 73, 81, 82), and on three different occasions before January 7, 1949, he talked to Mr. Cushman, manager of Utah Power & Light Company, Preston Division, telling him that his lands were being flooded. (R. 74-76, 79).

A few days prior to January 7, 1949, Mr. V. D. Smart, maintenance foreman of the State Highway Department of Idaho, (R. 88), noticed that ice jams were forming in the river near the Preston-Dayton River Bridge, (R. 89), which lies about two miles south of appellants' lands, (R. 71), and prior to January 7, 1949, he called appellee at its Oneida Station and told it the road was being flooded and it looked as if they would lose the bridge if something wasn't done. (R. 90-92).

Ice jams formed in the river north of appellants' lands, causing the water to back up, (R. 82, 83, 89) and on January 7, 1949, (R. 76, 95) it left its channel, flowing to the southwest over the appellants' lands, or in other words, it came from the northeast. (R. 95, 98). The water did not come out of the channel as it passed through appellants' lands. It came from the north over the lands of other persons. (R. 82).

The flood, as it passed over appellants' lands, reached a width of about 80 rods and a depth of several feet. (R. 97)

It was stipulated as a result of the flood 12 head of cattle were drowned, the realty injured, and other personal property destroyed, in the total value of $5,027.00. (R. 70).

The purported release and easement was never offered nor received in evidence, the court ruling that the burden was upon the appellant to prove the appellee's easement by offering it in evidence and then to show that there had been a violation of the easement. The court did not define what the easement was. (R. 140-142.)

The easement was pleaded as an affirmative defense by the Appellee. (R. 20), (R. 142.) The court in effect held that the easement was part of Appellants' case and that it was on the appellant to first introduce the easement in evidence—valid or invalid—and then to show a violation of it. (R. 142.)

The appellant refused to consent to assume any burden except that which the law imposes on them. (R. 141)

At the conclusion of the Appellants' case, the Appellee moved the court for a directed verdict which was granted.

JUDGMENT

The court pursuant to directing a verdict entered up judgment in favor of appellee against appellants. (R. 52).

QUESTIONS PRESENTED

1. The appellant contends that the court committed an error in even sustaining in part the motion for summary judgment for the reason that the motion for summary judgment presented a question of fact which the court could not pass upon on affidavits to the exclusion of the jury.

2. The court erred in sustaining in part the appellee's motion for summary judgment for the reason that the easement merely granted to the appellee the right to fluctuate the stream as it flowed through the appellants' property, not to flood the lands, and in any event did not permit the flooding of appellants' lands except as the water flooded from the channel as it passed through appellants' property.

3. The court erred in imposing upon the appellant the burden of proving the existence of the easement and that it had been violated by the appellee, whereas the appellee had pleaded the original easements an affirmative defense and the burden was on the appellee to prove its affirmative defense.

4. The court erred in directing the jury to return a verdict in favor of appellee and against appellants when the plaintiffs had made out a prima facie case of liability on the part of the appellee.

5. The court erred in holding that the alleged easement and release was valid and authorized the flooding of the appellants' lands with impunity by the appellee.

POINTS AND AUTHORITIES

1. On motion for summary judgment if there is an issue of fact presented summary judgment will not be granted.

Hoff v. St. Mercury Indemnity Co., 74 Fed. 2d 689.

2. Possession of land by vendee is sufficient notice to put others on inquiry as to his rights.

8 Thompson on Real Property Permanent Edition, Page 424, Section 4521;

55 Am. Jur. 1087, Section 712;

Simmons Creek Coal Co. v. Doran, 143 U.S. 417, 35 L.Ed. 1063, 12 S. Ct. 239;

Kirby v. Talmadge, 160 U.S. 379, 40 L. Ed. 463, 16 S. Ct. 349.

3. Contracts whereby servitudes are created are designed to confer rights, impose obligations which otherwise would have no existence and are strictly construed.

28 C.J.S. 753 Sec. 75;

Shaffer v. State National Bank, 37 L. Ann. 242;

Dickson v. Arkansas Louisiana Gas Co., 193 So. 246.

4. Where an easement is created by special grant or reservation the extent of the right acquired depends not upon user but upon terms of the grant or reservation properly construed and the servient estate will not be burdened to a greater extent than was contemplated or intended at the time of the creation of the easement.

28 C.J.S. 752, Section 75;

Westcoast Power Co. v. Buttram, 31 P. 2d 687, 54 Ida. 318;

Fendall v. Miller, 196 P. 381, 99 Ore. 610;

Dyer v. Compere, 73 P. 2d 1356, 41 N. Mex. 716.

5. Where the grant or reservation is specific in its terms it is decisive of the limits of the easement.

28 C.J.S. Page 753, Sec. 75;

Dyer v. Compere, 73 P. 2d. 1356, 41 N. Mex. 716;

Henry v. Tenn. Elec. Power Co., 5 Tenn. App. 205;

Fendall v. Miller, 196 P. 381, 99 Ore. 610.

6. Whenever anyone creates an obstruction to the natural flow of water a person whose property is injured thereby has a good cause of action.

Fischer v. Davis, 113 P. 910, 116 P 412 19 Ida. 493;

Hall v. Washington Water Power Co., 149 P. 507, 27 Ida. 437;

Thies v. Platte Valley Public Power & Irrig. Dist., 289 N.W. 386, 137 Neb. 344;

Chandler v. Drainage Dist. No. 2 of Boundary Co., 187 P. 2d 971, 68 Ida. 42;

Scott v. Watkins, 122 P. 2d 220, 63 Ida. 506.

7. And where damages occur from defendant's negligence or act and an act of God as concurring causes, the defendant is liable to same extent as though damages had been caused by his negligence alone.

Inland Power & Light Co. v. Grieger, 91 Fed. 2d 811, (9th C. CA.)

8. The right to an easement as a defense must be specially pleaded.

28 C.J.S. Page 734, Section 67;

Dunier v. Ruttland Ry. Lt. & Power Co., 110 Atl. 4, 94 Vt. 187;

8(c) Fed. Rules of Civil Procedure.

9. When a party justifies his act under an easement the burden is upon him not only to prove the easement but also to prove that the things done comes within the terms of the easement. This is especially true where the grant is conditional.

Jackson v. Harrington, 2 Allen Rpts. 242;

Swenson v. Marino, 29 N.E. 2d. 15; 306 Mass. 582; 130 A.L.R. 763;

Wigmore on Evidence 3rd Edition, Vol 9, Page 496 Sec. 2537.
31 C.J.S. Page 709 Sec. 104;
Harmon v. Adams, 120 U.S. 363, 30 L. Ed. 683; 7 S. Ct. 553;
Griffin v. Bartlett, 55 N.H. 119;
Dutton v. Stoughton, 65 Atl. 91, 79 Vt. 361;
Davis v. Louisville & N. R. Co., 244 S.W. 483, 147 Tenn. 1;
Morris v. Commander, 55 N.C. 510;
Fortier v. H. P. Hood & Sons, 30 N.E. 2d 253, 307 Mass. 292;
Roediger v. Cullen, 175 P. 2d 669, 26 Wash. 2d 690;
Goldstein v. Beal, 59 N.E. 2d 712, 317 Mass. 750;
Lambert v. Rodier, 194 S.W. 2d 934 (Mo.);
Coughran v. Nunez, 127 S.W. 2d 885 (Tex.);

10. The rule is that the burden of proof constitutes a substantial right of the party on whose adversary the burden rests, and that this right should therefore be jealously guarded, and rigidly enforced by the court, and the court has no right to take the burden of proof from the shoulders of one party and shift it to another.

22 C.J. Page 70;
31 C.J.S. Page 709, Sec. 104;
Fisher v. Jackson, 216 N.C. 302, 4 S.E. 2d 847;
Boswell v. Pannell, 107 Tex. 433, 180 S.W. 593.

11. The burden of proof as to a fact or issue generally rests upon a party pleading it or having the affirmative of the issue and remains on that party throughout the trial.

31 C.J.S. Page 709, Section 104;
Reliance Life Insurance Co. v. Burgess, 112 Fed. 2d 234;
Certiorari denied, 61 S. Ct. 137;
Rehearing denied, 61 S. Ct. 391.

SPECIFICATIONS OF ERROR OR POINTS RELIED ON

1. The court erred in sustaining defendant's motion for a summary judgment to the effect that the defendant had an easement permitting it to flood plaintiffs' land.

2. The court erred in ruling that plaintiff must prove that defendant had abused its easement permitting it to flood plaintiffs' land before plaintiff could recover against the defendant.

3. The court erred in directing the jury to return a verdict in favor of the defendant and against the plaintiff.

4. The court erred in entering judgment against the plantiff and in favor of the defendant no cause of action, and in awarding defendant its costs. (R. 147)

ARGUMENT

I

THE APPELLANTS CONTEND THAT THE COURT COMMITTED ERROR EVEN IN SUSTAINING IN PART THE MOTION FOR SUMMARY JUDGMENT FOR THE REASON THAT MOTION FOR SUMMARY JUDGMENT PRESENTED A QUESTION OF FACT WHICH THE COURT COULD NOT PASS UPON AFFIDAVITS TO THE EXCLUSION OF THE JURY.

In opposition to appellee's motion for summary judgment the appellants filed the affidavit of Edward Griffeth in which it set forth that prior to the execution of the release and easement by George Thomas etux, Edward Griffeth was in possession and occupancy of the property under contract to purchase and that he did not know of nor consent to the execution of the said release and easement.

This put the appellee on notice as to the right of said Edward Griffeth and it took subject thereto. Thus there

was presented the issue of fact as to whether or not appellants' property was ever subject to the easement.

8 Thompson on Real Property Permanent Edition, Page 424, Section 4521;

55 Am. Jur. 1087, Section 712;

Simmons Creek Coal Co. v. Doran, 143 U.S. 417, 35 L. Ed. 1063, 12 S. Ct. 239;

Kirby v. Talmadge, 160 U.S. 379, 40 L. Ed. 463, 16 S. Ct. 349.

A question of fact being presented, the court could not decide the issue to the exclusion of the jury.

Hoff v. St. Mercury Indemnity Co., 74 Fed. 2d 689.

II

THE COURT ERRED IN SUSTAINING IN PART THE APPELLEE'S MOTION FOR SUMMARY JUDGMENT FOR THE REASON THAT THE EASEMENT MERELY GRANTED TO THE APPELLEE THE RIGHT TO FLUCTUATE THE STREAM AS IT FLOWED THROUGH THE APPELLANTS' PROPERTY, NOT TO FLOOD THE LANDS, AND IN ANY EVENT DID NOT PERMIT THE FLOODING OF APPELLANTS' LANDS EXCEPT AS THE WATER FLOODED FROM THE CHANNEL AS IT PASSED THROUGH APPELLANTS' PROPERTY.

Paragraph 2 of the Release and Easement releases appellee from damages to the lands in question occurring prior to December 22, 1926, "caused by flooding or by the impounding or storage of water or waters of Bear River or by fluctuation of the flow of said river or by depositing ice thereon or otherwise."

Paragraph 3 contains the easement, the granting clause, and paragraph 4 sets forth a release for damages resulting from future flooding or depositing of ice. This release is personal and not binding on the appellants.

The grant in paragraph 3 said:

"And for said consideration above made grantors

> and successors and assigns hereby grant unto said Utah Power & Light Co., its successors and assigns, an easement for and the right to continue as aforesaid, the manipulation and fluctuation of the flow of the said river as it passes in its natural channel through or along the lands owned, claimed or possessed by the grantors."

The appellants believe that had the appellee bargained with their predecessor in interest for an easement to flood their lands—such a right would have been set forth in the granting clause. The release of prior damages covered flooding and depositing of ice, thus if it had been the intent to grant an easement to flood or deposit ice why did not the grant set forth such right? (The Release and Easement is set forth at page 4 of this brief.)

The foregoing granting clause is definite and specific in its terms and limits the appellee to the "right to continue as aforesaid the manipulations and fluctuation of the flow of the said river as it passes in its natural channel through or along the land". Had it been the intent of the grantors to grant an easement to flood the land or deposit ice thereon the grantors would have set forth such a right in the granting clause. The terms of the release, in paragraph 2, reflect that the appellee bargained for and received a release for prior damages caused by flooding, impounding or storage of water and fluctuation of the stream or depositing of ice, whereas the easement and granting clause establishes that all the appellee bargained for by way of an easement was the right to fluctuate the water as it passed through the appellants' land.

Contracts creating easements are strictly construed.

28 C.J.S. 753, Sec. 75;

Shaffer v. State National Bank, 37 L. Ann. 242;

Dickson v. Arkansas Louisiana R. Co., 193 So. 246.

And where the easement is definite and specific in its terms it is decisive as to the limitation of the easement.

28 C.J.S. 753, Sec. 75;
Dyer v. Compere, 73 P. 2d 1356, 41 N. Mex. 716;
Henry v. Tenn. Elec. Power Co., 5 Tenn. App. 205;
Fendall v. Miller, 196 P. 381, 99 Ore. 610.

The complaint further showed that the lands of the appellants were flooded by water leaving the banks of the river at a point about 40 rods from the property line of the appellants. The lands were not flooded by the water leaving the banks as it flowed through the appellants' lands, and the appellants contend that even assuming that the grant gave the appellee the right to flood appellants' lands, which appellants deny, nevertheless it was never within contemplation of the parties at the time of the execution of the purported easement that it would protect the appellee in flooding appellants' lands when such flooding was occasioned by the overflow of the banks of the river upstream from appellants' lands and the passing of water over other lands on to the appellants' lands.

The law is definite that a servient estate will not be burdened to a greater extent than was contemplated or intended at the time of the creation of the easement.

28 C.J.S. 752, Sec. 75;
Westcoast Power Co. v. Buttram, 31 P. 2d 687, 54 Ida. 318;
Fendall v. Miller, 196 P. 381, 99 Ore. 610;
Dyer v. Compere, 73 P. 2d 1356, 41 N. Mex. 716.

However, it should be borne in mind that at all times in consideration of this alleged easement that it was not introduced in evidence, and as we shall attempt to demonstrate later, that the duty was on the appellee to introduce it in evidence and bring it before the court. This discussion, therefore, is confined to a consideration of the motion for summary judgment.

III

THE COURT ERRED IN DIRECTING THE JURY TO RETURN A VERDICT IN FAVOR OF THE APPELLEE AND AGAINST THE APPELLANTS AS THE APPELLANTS HAD MADE OUT A CASE SUFFICIENT FOR THE JURY.

In considering a motion for a directed verdict the court will consider the evidence in its more favorable light to the appellants with every inference of fact that might be drawn from it.

Inland Power & Light Co. v. Grieger, 91 Fed. 2d 811, 9th C. Ct.

The appellants' evidence established that since appellee built its dam at Oneida, Idaho, in about 1914, it had regulated the flow of the water passing down Bear River from this point, and as it passed through appellants' lands; that all of the water flowing down Bear River from Oneida had to pass either over or under the dam and that the dam was situated about 14 miles north of appellants' property; that several days before flooding of appellants' land and up to and including the 7th day of January, 1949, appellee had released more water over the dam than flowed into the river from the river's natural watershed; that the appellants' lands had never been flooded until they were flooded in January, 1949; that prior to the building of appellee's dam at Oneida the water of Bear River flowed uncontrolled in its natural channel, and during the winter months the river would freeze over and the water would flow under the ice, never overflowing its banks, however, after the dam was built and the appellee started to regulate the flow of the river and this condition no longer resulted. As in the morning it would send limited or small amounts of water from the dam at Oneida, followed in the afternoon by large amounts of water; that in the winter months when small amounts of water were sent down the river it would freeze

over and then in the evening when large amounts of water were sent down the river it would cause the ice already formed to break up and this ice would settle at the bottom of the stream and other ice would be deposited in the same; that this ice would then break loose, causing ice jams to form in the river channel; that this condition happened for several years prior to the time the appellants' lands were flooded. Appellee was fluctuating the stream during December 1948 and January 1949. Appellants' evidence further shows that a few days prior to the 7th of January, 1949, when their lands were flooded the water was being backed up and was flooding over the south end of appellants' property; that upon noticing this Melvin Griffeth, one of the appellants, called the manager of Utah Power & Light Company at Preston, telling him of this situation and advising him that unless something was done the appellants' lands would be flooded. Appellants' evidence also showed that the ice jams were forming south of their property and that water was being backed up and flooding over the road at the Preston Dayton Bridge, the bridge is about two miles south of appellants' lands. This flooding came to the attention of Mr. Smart, the maintenance foreman of the State Highway Department. He called the appellee at its station at Oneida Dam, telling them that the water was backing up, flooding the road and that unless something was done he was afraid it would wash out the bridge. It was a cold winter and the appellee knew it as it kept a daily temperature record. On the 7th day of January, 1949, an ice jam occurred north of appellants' lands, diverting the water from the channel over lands north of appellants' lands and then from these lands upon the lands of the appellants; the flood was several feet in depth and was spread out over an area of about 80 rods.

In the absence of an easement or some contractual

exemption from liability on the part of the appellee under the Idaho Law, this showed a case for the jury at least and would have sustained a verdict in favor of appellants. There are numerous Idaho cases that hold to the effect that

> "there is no question that a person cannot build a dam, imbankment or other artifical means, obstruct the natural flow of water in a stream and cause it to overflow or to run upon a riperion owner's land."
>
> Chandler v. Drainage District No. 2 of Boundary County, 187 P. 2d 971, 68 Ida. 42.
>
> Scott v. Watkins, 122 P. 2d 220, 63 Ida. 506;
>
> Fisher v. Davis, 113 P. 910, 116 P. 412, 19 Ida. 493;
>
> Hall v. Washington Water Power Co., 149 P. 507, 27 Ida. 437;
>
> See also Thies v. Platte Vy. Pub. Power & Irrigation Dist. 289 N.W. 386, 137 Neb. 344.

We specifically invite the courts to a consideration of the Thies v. Platte Valley Public Power & Irrigation District case supra where the facts of that case were not as strong as the evidence in this case and yet the learned Supreme Court of Nebraska affirmed the judgment in favor of the land owners and against the power district.

Under the law the power company is liable if it causes the water to overflow the land owners' land. We have established this fact, at lease sufficient to make the question for the jury.

Then we submit that we were entitled to go to the jury because up to this point there was nothing before the jury with respect to the alleged easement or release and having presented facts sufficient to establish a case, then we inquire why were we not entitled to have it submitted to the jury? And the only reason that the learned trial judge gave us was that he had put the burden of proof on the plaintiff to prove the affirmative defense of the

defendant; a thing which he had no right to do. He did say finally, when he was more or less cornered on his unsound position, that we had not proved a case even without regard to the easement and we contend in this respect he is equally wrong as he is in his position that the burden of proof was on the plaintiff to disprove an affirmative defense of the defendant before the defendant had offered any evidence on it. Within the Idaho law, we had established a case and we believe that the record would sustain us in the position even if it were necessary that we established the negligence of the appellee. This is certainly true under the holding of this honorable court in the case of Inland Power & Light Co. v. Grieger, 91 Fed. 2d 811. Certainly within the Idaho authorities all that needs to be shown is to establish a case that the riperion owners' lands were overflowed by reason of the acts of the defendant.

IV

THE COURT ERRED IN IMPOSING UPON APPELLANTS THE BURDEN OF PROVING THE EXISTENCE OF THE EASEMENT AND THAT IT HAD BEEN VIOLATED BY THE APPELLEE, WHEREAS THE APPELLEE HAD PLEADED THE ORIGINAL EASEMENT AS AN AFFIRMATIVE DEFENSE AND THE BURDEN WAS ON THE APPELLEE TO PROVE ITS AFFIRMATIVE DEFENSE.

We pass now to a consideration of where the burden of proof lies to establish the right of appellees to overflow appellants' lands. The most that can be said of the purported easement, if any, is that it is conditional and where a party attempts to justify his act under an easement and particularly a conditional easement the burden is upon him not only to prove the easement but also to prove that the things done would come within its terms. If the easement gave appellee the right to flood appellants' lands, which appellants deny, it was not a general right by conditional, as it said.

> "And for said consideration any damages that may result from future flooding or depositing of ice on said land caused by the fluctuation of the flow of said river in the normal operation of Grantee's plant or plants, up stream from Grantor's land, are hereby waived and released, provided future fluctuations shall not exceed those heretofore occurring in the operation of said Oneida Plant."

The Supreme Judicial Court of Massachusetts had before it the construction and application of a conditional easement in the case of Jackson v. Harrington, 2 Allen Reports, 242. The deed contains the following clause:

> "Also the ground of the dam belonging to the said mills with the usual reservations usually made by the original proprietors for mill or mills, pond or ponds, for the exercise of which rights reference is to be had to the former deeds hereabouts, with liberty to flow or pond near such mills so much land as is necessary and convenient for the benefit of said mills agreeably to the original proprietors in such conveyance, and not otherwise."

The Supreme Judicial Court of Massachusetts held with respect to the matter of burden of proof in the case now being analyzed as follows:

> "The jury were rightly instructed that, under the pleadings in this case, the burden was on respondent to prove that he had a right to flow the complainant's land without making compensation, as high as he had flowed it." Jackson v. Harrington supra.

We invite the court's consideration to this well considered opinion. This case was decided in 1861 but Massachusetts courts have never receded from the position there taken, but have re-affirmed it down to date."

> See Swenson v. Marino, 29 N.E. 2d 15, 306 Mass. 582, 130 ALR 763;

The Supreme Court of the United States in a case involving the burden of proof under conditional release held that not only the burden of proof of establishing a release was upon the proponent thereof but that it also had to establish that it had performed the conditions.

Harmon v. Adams, 120 U.S. 363, 30 L. Ed. 683, 7 S. Ct. 553.

The foregoing decisions are in line with the general rule that the burden of proof of a fact or issue generally rests upon the party pleading it or having the affirmative of the issue and remains with that party throughout the trial.

31 C.J.S. 709, Sec. 104;

Wigmore on Evidence 3rd Edition Vol. 9, P. 496, Sec. 2537.

We particularly invite the court's attention to a decision from the 8th Ct. The Reliance Life Insurance Co. v. Burgess, 112 Fed. 2d 234.

Cert. Denied 61 S. Ct. 137;
Rehearing Denied 61 S. Ct. 391.

It is disclosed by the record in this case that the learned trial judge, contrary to all precedent that had gone before, lifted the burden of proof from the obligations of the appellee and placed it upon the appellants. This we submit the court had no power to do and in this connection we will ask the indulgence of the court to cite the following authorities.

22 C.J. Page 70;

31 C.J.S. Page 709, Sec. 104.

It has been well said by the Supreme Court of North Caroline:

"The rule as to the burden of proof is important and indispensable in the administration of justice.

> It constitutes a substantial right of the party upon whose adversary the burden rests, and therefore should be carefully guarded and rigidly enforced by the courts. State v. Faulconer, 182 N.C. 793, 798, 108 S.E. 756, 17 A.L.R. 986 and cases there cited."

Fisher v. Jackson, 216 N.C. 302, 4 S.E. 2d 847.

The Supreme Court of Texas in a well considered case said:

> "The burden of proof never shifts from plaintiff to defendant, but is upon the plaintiff throughout the trial to establish by preponderance of the evidence the affirmative of the issue or issues upon which he relies for recovery. It is an old and well settled rule that the burden of proof rests upon the plaintiff to establish his case by a preponderance of the evidence. It has been so long in use that many consider it a mere formality, but it is not so. It is no idle ceremony, but its office is important and indeed indispensable, in the administration of justice. It should be jealously guarded by the courts for a trial without it would in many instances be a mockery, and in all instances unfair resulting often in a miscarriage of justice. But it is one of those rules which operate equally for the plaintiff and defendant; that is, the burden is on the plaintiff to establish by a preponderance of evidence the issues upon which he relies for recovery and likewise it is upon the defendant to establish his defenses to the plaintiffs' alleged cause of action by a preponderance of the evidence. So that, when the court charges the jury, he should apply the rule to the plaintiff's alleged cause of action, and then apply it also to the defendants' defense or defenses. These rules of practice are familiar to all, and require no citation of authority."

Boswell v. Pannell, 107 Tex. 433, 180 S.W. 593.

The court in the trial of this case violated these salutory rules of law that have marked the course to be pursued

by litigants since time immemorial and refused to permit the appellants to go to the jury unless they had shouldered the appellee's burden with respect to the appellee's affirmative defense. This we submit was error on the part of the learned trial court and we defy counsel for appellee to sustain the rule of the trial court in transferring the burden of proof from the appellants to the appellee with respect to affirmative defenses.

V

THE COURT ERRED IN HOLDING THAT THE ALLEGED RELEASE AND EASEMENT WAS VALID AND AUTHORIZED THE FLOODING OF APPELLANTS' LAND.

In this respect we would like to make our position clear that in discussing this matter we do not concede that the appellee had a right to flood appellants' land as the easement gave it only the right to fluctuate the water as it passed through appellants' lands, however should the court construe the easement otherwise we contend that under the facts of this case it nevertheless offers the appellee no protection as the most favorable interpretation to appellee would limit flooding or depositing of ice, only so long as such results from flooding originating within the boundaries of appellants' land. The easement would afford no protection for flooding originating without the lands of the appellant. In this case the facts were, that the flood originated from the river channel from lands lying north of appellants' property. We will not burden the court further in arguing this proposition, having argued it under Argument II, (page 21) which we beg leave to refer the court to.

In conclusion, we believe that the appellants have been denied a right to submit their case to a jury of their peers

and that the erroneous decision of the learned trial court to the contract should be reversed and the cause remanded with directions to submit the matter to a jury, for which the foregoing is

Most respectfully submitted,

WALTER H. ANDERSON
Residence and Post Office Address,
Pocatello, Idaho.

GUS CARR ANDERSON
Residence and Post Office Address,
Pocatello, Idaho

NEWEL G. DAINES
Residence: Logan, Utah
Address: Cache Valley Bank Bldg.,
Logan, Utah

L. DELOS DAINES
Residence: Salt Lake City, Utah
Address: 623 Continental Bank
Bldg., Salt Lake City, Utah